

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

|  |   |                |
|--|---|----------------|
| In the Matter of the Petition                  | : |                |
| of   | : |                |
| MICHAEL AND GRACE PRICE                        | : | DETERMINATION  |
|  | : | DTA NO. 808095 |
| for Redetermination of a Deficiency or for     | : |                |
| Refund of Personal Income Tax under Article 22 | : |                |
| of the Tax Law for the Year 1986.              | : |                |

---

Petitioners, Michael and Grace Price, 305 Evergreen Drive, Batavia, Illinois 60510, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1986.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 16, 1991 at 1:15 P.M., with additional documentation to be submitted by January 24, 1992. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

ISSUES

- I. Whether petitioners timely filed extensions of the time within which to file their tax return.
- II. Whether petitioners failed to properly estimate and pay at least 90% of their income tax liability for 1986 in a timely manner, thereby invalidating an extension of the time within which to file their tax return and subjecting them to late filing penalties.

FINDINGS OF FACT

On October 15, 1987, petitioners, Michael and Grace Price, filed a New York State and City of New York Nonresident Income Tax Return (Form IT-203) for the year 1986. Attached to this return was, inter alia, a copy of Form IT-370 ("Application for Automatic Extension of Time to File"), by which petitioners had requested an automatic four-month extension of the

time within which to file their 1986 return (i.e., from April 15, 1987 to August 15, 1987), a second copy of Form IT-370 by which petitioners had requested an additional one-month extension of the time within which to file their 1986 return (i.e., from August 15, 1987 to September 15, 1987) and a copy of Federal Form 2688 ("Application for Additional Extension of Time to File"), by which petitioners had requested an additional one-month extension of the time within which to file their 1986 return (i.e., from September 15, 1987 to October 15, 1987). On the Federal Form 2688, petitioners had crossed out the "2688" and had handwritten "IT-372(NY)". The extensions are dated April 14, 1987, August 15, 1987 and September 12, 1987, respectively. In addition, attached to the return was Form IT-2105.9 ("Underpayment of Estimated Income Tax by Individuals"), which indicated estimated tax payments for 1986 as follows:

|                    |                 |
|--------------------|-----------------|
| April 15, 1986     | \$ 70.00        |
| June 16, 1986      | 1,350.00        |
| September 15, 1986 | 3,250.00        |
| January 15, 1987   | <u>3,250.00</u> |
| Total              | \$7,920.00      |

Petitioners also filed for 1986 an Illinois Individual Income Tax Return (Form IL-1040) in which they reported as income capital gain of \$85,687.00 not reported as Federal income.

(a) Petitioners' Form IT-203 included the following information:

|                                 |              |                        |
|---------------------------------|--------------|------------------------|
| Capital Gain                    |              | \$52,722.00            |
| Rents and Royalties             |              | (5,189.00)             |
| Partnership Income <sup>1</sup> |              | <u>11,962.00</u>       |
| Total Income                    |              | \$59,495.00            |
| Less: N.Y. Itemized Deduction   |              | (4,709.00)             |
| Less: Exemption                 |              | <u>(1,995.00)</u>      |
| N.Y. Taxable Income             |              | <del>\$52,791.00</del> |
| N.Y. State Tax                  | \$5,712.00   |                        |
| N.Y. City Tax                   | <u>65.00</u> |                        |
| Total Taxes                     |              | \$ 5,777.00            |
| Less: Estimated Tax Paid        |              | <u>7,920.00</u>        |
| Amount Overpaid                 |              | <del>\$ 2,143.00</del> |

(b) Petitioners' Forms IT-370

---

<sup>1</sup>"Partnership income" consisted of income from a family-owned business located in New York State the dollar amount of which was allegedly not known or ascertainable by petitioners as of the April 15, 1987 due date for petitioners' return (see, Finding of Fact "6", infra).

included the following information:

|                                   |                 |
|-----------------------------------|-----------------|
| N.Y. State Tax Liability for 1986 | \$5,030.00      |
| Total Estimated Tax Paid          | <u>7,900.00</u> |
| Tax Due                           | <u>\$—0.00</u>  |

On November 11, 1987, the Division of Taxation issued to petitioners a Statement of Income Tax Audit Adjustment for the year 1986 which contained an adjustment to the Form 2105.9 filed by petitioners with their 1986 nonresident income tax return. The statement indicated estimated tax paid for the year 1986 of \$7,920.00. It is noted that the copy of petitioners' 1986 nonresident income tax return introduced by the Division into the record of this hearing did not include the Form 2105.9. However, the Statement of Income Tax Audit Adjustment establishes that such form was filed by petitioners, as does the reference to Form 2105.9 on line 74 of petitioners' nonresident income tax return.

On December 9, 1988, the Division issued to petitioners a Statement of Audit Changes for the years 1985 and 1986 in which petitioners'

New York State tax liability was recomputed to include minimum income tax. The statement explained as follows:

"Net long term capital gains are reportable at 40%. Accordingly, the 60% not subject to New York Personal Income Tax is an item of tax preference, and subject to New York minimum income tax.

Penalty for late filing has been applied at 5% per month up to a maximum of 25% (Section 685(a)(1) of the New York State Tax Law)."

For the year 1986, the statement indicated additional income tax due of \$4,125.42, plus penalty of \$1,031.55 and interest. Petitioners paid the tax and interest due for both years and the penalty for 1985. The amount not paid, and at issue in this matter, is the penalty imposed for the late filing of the 1986 nonresident income tax return. Penalties were imposed because the Division had no record of receiving the applications for automatic and additional extensions of time to file prior to the filing of the 1986 return in October 1987.

On March 2, 1989, the Division issued to petitioners a Notice of Deficiency asserting penalty of \$1,031.55, plus interest. Petitioners filed a Request for Conciliation Conference on

April 17, 1989 with the Bureau of Conciliation and Mediation Services. The Division did not introduce a copy of the Notice of Deficiency issued to petitioners into the record of this hearing.<sup>2</sup> An accounts receivable computer printout and the testimony of an Income Tax Technician were presented which indicated that the Notice of Deficiency was issued on March 2, 1989. In addition, petitioners

conceded that they received the Notice of Deficiency and filed the Request for Conciliation Conference in response thereto.

At the hearing, the Division explained that penalty was imposed because the extensions claimed to have been filed by petitioners were not in the Division's records. In addition, it was the position of the Division that, regardless of whether the extensions had been mailed and received, petitioners' initial extension of time was invalid because the total payments received by the return's due date of April 15, 1987 was less than 90% of the tax due. This computation was based upon comparing the estimated tax payments totalling \$7,920.00 to the total of the amount shown due on the return of \$5,712.00 plus the additional amount determined to be due on audit of \$4,125.42.

During the course of the hearing, petitioner Michael Price explained that his Illinois accountant timely filed the three extensions at issue. Mr. Price further testified that similar extensions were filed and accepted by the Internal Revenue Service and the Illinois Department of Revenue. Mr. Price explained that the extensions were necessary because he was a partner in a family business located in New York City, and the accountants for the partnership were late in getting to him the income tax information needed to complete his personal return. In addition, Mr. Price testified that his accountant erroneously reported the capital gain excluded from Federal income as Illinois income rather than New York income.

---

<sup>2</sup>The Division requested and was granted additional time to January 24, 1992 to provide a copy of the Notice of Deficiency to the Administrative Law Judge. No correspondence was received from the Division after the hearing.

## CONCLUSIONS OF LAW

A. Tax Law § 657(a) provides as follows:

"Extensions of time

(a) General. The [Commissioner of Taxation] may grant a reasonable extension of time for payment of tax or estimated tax (or any installment), or for filing any return, statement, or other document required pursuant to this article, on such terms and conditions as [he] may require. Except for a taxpayer who is outside the United States or who intends to claim nonresident status pursuant to subparagraphs (i), (ii) and (iii) of paragraph one of subsection (a) of section six hundred five, no such extension for filing any return, statement or other document, shall exceed six months."

B. According to the foregoing, the Commissioner of Taxation (formerly the State Tax Commission) is vested with discretion to extend the time to file a return or other document upon such terms and conditions as he may require. Regulations in effect during the year in question and found at 20 NYCRR 151.2(a) specified those terms and conditions which, if met, would automatically result in a valid four-month extension of time to file. These conditions were: (1) that a timely request for extension be filed; (2) that a proper estimate of the tax liability be made, with such estimate deemed proper if it was at least 90 percent of the taxes as finally determined; and (3) payment of such properly estimated amount, if more than \$1,000.00, at the time the request for extension was filed. The "taxes as finally determined" was defined as "the amount of total taxes which the new York State income tax return shows to be due or would have shown to be due except for mathematical errors." An individual who anticipated having no amount of tax remaining unpaid on the date the return was due was allowed an automatic four-month extension of time to file the return if the above-stated conditions were met (20 NYCRR 151.2[b]).

Tax regulation 20 NYCRR 151.3 provided for the granting of an additional extension of time for filing a New York State personal income tax return if an automatic extension was filed and a further extension was applied for on Form IT-372 ("Application for Additional Extension of Time to File for Individuals). The application was required to be made before the expiration of the automatic four-month extension of time to file and was required to be specifically granted in writing by the Division.

C. The first issue to be addressed is whether petitioners timely filed the initial automatic extension of time for filing their 1986 personal income tax return. Petitioner Michael Price offered credible testimony that his accountant had in fact timely mailed the extension. The Division has alleged that the extension was not filed based upon a review of its records. However, it is noted that the Division failed to introduce into the record of this matter the Form IT-2105.9, which was attached to petitioners' personal income tax return, and the Notice of Deficiency issued to petitioners. The apparent failure to locate these documents weakens the Division's reliance upon its own recordkeeping to rebut the credible testimony presented that the extension was in fact filed and renders plausible the theory that the extension, like the Form IT-2105.9 and the Notice of Deficiency, was misplaced. Therefore, based upon the credible testimony of the witness and the inadequacies of the Division's recordkeeping with regard to these particular taxpayers, it is concluded that petitioners timely filed the automatic extension for filing their 1986 nonresident income tax return.

D. The Division's position with regard to petitioners' submission of 90% of the taxes finally determined to be due is contrary to the income tax regulations. The Division takes the position that, in determining the taxes finally determined to be due, the amount of tax shown due on petitioners' return is to be added to the amount of additional tax that was determined to be due on audit. However, the regulations in effect during the year at issue provided that "the taxes as finally determined" was "the amount of total taxes which the New York State income tax return shows to be due or would have shown to be due except for mathematical errors" (see, 20 NYCRR former 151.2[a][3][i]). The additional tax determined to be due on audit was not the result of a mathematical error. In the year at issue, when determining whether a taxpayer properly estimated and paid at least 90% of the taxes finally determined to be due, the amount paid was to be compared to the amount shown on the return when filed. Here, petitioners' estimated tax payments (\$7,920.00) exceeded the total tax due as shown on the return filed (\$5,777.00). Therefore, it is concluded that petitioners made a proper estimate and payment of the taxes finally determined to be due as of the date of filing their automatic extension request.

This conclusion is consistent with the regulation found at 20 NYCRR 151.2(b), which allowed an individual an automatic four-month extension of time to file a return where the individual anticipated having no amount of New York State personal income tax remaining unpaid as of the date prescribed for the filing of such return, if such individual complied with the requirements of 151.2(a). In the present matter, the estimated tax payments made by petitioners exceeded their tax liability both as anticipated at the time the return was initially due (April 15, 1987) and at the time the return was filed (October 15, 1987). Therefore, petitioners received a four-month extension to August 15, 1987 within which to file their 1986 personal income tax return.

E. A different conclusion is reached, however, with regard to the two additional extension requests filed by petitioners in August and September 1987. Petitioners' additional extension requests were not filed on Form IT-372 as is required by the regulations. More importantly, the requested extensions were not specifically granted in writing by the Division. Although it is determined that, like the automatic extension, the additional extension requests were timely filed, such extensions were not granted, and the filing date for petitioners' return remained August 15, 1987.

F. 20 NYCRR 151.7(b), as in effect during the year in question, provided as follows:

"Additions to tax. The additions to tax for late filing and late payment must be imposed on any balance of New York State personal income tax, City of New York tax and City of Yonkers tax remaining unpaid after the due date of the return, determined with regard to any extensions of time to file or extensions of time to pay, unless it can be shown that a basis for reasonable cause exists pursuant to section 102.7 of this Title for such late filing or late payment or unless the provisions relating to the presumption of reasonable cause pursuant to paragraph (c)(2) of section 102.7 of this Title are met for such late payment." (Emphasis added.)

G. Regulations concerning reasonable cause, found at 20 NYCRR 102.7, provide that the penalties at issue herein may be abated if petitioners can establish that the failures to timely file and pay were due to reasonable cause and not due to willful neglect.

20 NYCRR 102.7 provides, in relevant part, as follows:

"(d) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer, employer or other person:

\* \* \*

(4) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause.

(e)(1) Except as provided for in subparagraph (2)(ii) of this subdivision, an inability to timely obtain and assemble essential information (including wage and tax statements or returns of information from an employer or payor) required for the preparation of a complete New York State income tax return, shall not be a basis for reasonable cause." (Emphasis added.)<sup>3</sup>

H. Petitioners have not established entitlement to abatement based on reasonable cause. Petitioners' 1986 personal income tax return was late filed because information concerning the partnership's income was not timely provided to petitioners' accountant. As 20 NYCRR 102.7(e)(1) provides, the inability to timely obtain and assemble essential information required for the preparation of a complete New York State income tax return shall not be a basis for reasonable cause. Therefore, petitioners are liable for the penalty imposed for late filing their return for the period August 15, 1987 through October 15, 1987.

I. The petition of Michael and Grace Price is granted to the extent indicated in Conclusion of Law "D"; the Division of Taxation is directed to modify the Notice of Deficiency dated March 2, 1989. The petition is, in all other respects, denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

---

3

20 NYCRR 102.7(e)(2)(ii) is applicable to the situation where the taxpayer is unable to properly estimate the tax as finally determined to be due because of an inability to obtain and assemble essential information. Here, petitioners were able to properly estimate the tax as finally determined despite their inability to obtain the information relating to the partnership income (see, Conclusion of Law "D").